Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FIDELITY TECHNOLOGIES CORPORATION,

Petitioner,

v.

LONNIE B. BUTLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Third Circuit Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May employees of a federal contractor circumvent the exclusive remedial provisions of the Service Contract Act by bringing a state law claim that imposes monetary penalties and attorneys' fees for violations of the Act?

PARTIES TO THE PROCEEDING

The petitioner is Fidelity Technologies Corporation.

The respondents are Lonnie Butler, Audrey Anderson, Robert Armer, W.L. Basco, Linda Behan, James Bryant, Loyil Cryer, Lane Dunn, Karan Mahlen, Joseph Martin, Margaret Mayo, Frances Melchiorri, Donald Savant, Ramona Smart, Harold Staples, and Ruby Hutson.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner Fidelity Technologies Corporation certifies that it has no parent companies, non-wholly-owned subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fidelity Technologies Corporation ("Fidelity") respectfully requests that a writ of certiorari issue to review the decision of the Louisiana Court of Appeal for the Third Circuit, entered on December 26, 1996.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the Third Circuit in this case is reported at 685 So.2d 676 and is reprinted in the appendix hereto ("App.") at App. 2. The Louisiana Supreme Court's order denying an application for a writ of certiorari is reprinted at App. 1. The decision of the Thirtieth Judicial District Court of Louisiana is reprinted at App. 13.

JURISDICTION

The judgment of the Louisiana Court of Appeal for the Third Circuit was entered on December 26, 1996. Petitioner's timely petition for a writ of certiorari was denied by the Louisiana Supreme Court on March 21, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

PERTINENT STATUTORY PROVISIONS

The relevant provisions of the Service Contract Act, 41 U.S.C. §§ 351-358, are reprinted at App. 21. Louisiana Revised Statutes 23:631 and 23:632 are reprinted at App. 28 and App. 30, respectively.

STATEMENT OF THE CASE

1. This case raises the issue of whether respondents, the former employees of petitioner, may bring suit under state law to enforce contract rights that are based solely on the Service Contract Act, 41 U.S.C. §§ 351-358 ("SCA" or the "Act"). The SCA was enacted in 1965 to ensure that workers whose employers entered into service contracts with the federal government received minimum wages and fringe benefits based on the prevailing rates in the locality in which the contract was performed. In essence, the SCA extended to service employees the same rights that the Davis-Bacon Act, 40 U.S.C. § 276, *et seq.*, provided to employees working for federal construction contractors.

The SCA requires that every federal government contract exceeding $2,500 (with exceptions not relevant here), "the principal purpose of which is to furnish services . . . through the use of service employees," contain minimum wage provisions for each class of service employees in the performance of the contract. 41 U.S.C. § 351(1). More specifically, the SCA provides that contracts and bid specifications must contain "(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees" and "(2) A provision specifying the fringe benefits to be furnished the various classes." 41 U.S.C. § 351(a)(1)-(2). As to each such provision, the statute requires the Secretary of Labor to make a determination of the applicable minimum wages and fringe benefits based on prevailing rates in the locality of the performance of the contract. Pursuant to these statutory duties, the Secretary of Labor has promulgated an extensive body of regulations which govern this

determination. These regulations apply to the SCA, the Davis-Bacon Act, as well as to over 55 other statutes listed in the regulations, all of which require the determination of minimum wages for the protection of workers under federal or federally-assisted contracts.

The SCA also sets forth an exclusive remedial scheme for employees who assert a violation of the statute's substantive provisions. Under the Act, an employee alleging a violation of the SCA must file a complaint with the Department of Labor. 29 C.F.R. § 4.191. The employee may assert a right to recovery either as a result of underpayment or non-payment of compensation due under the Act. 29 C.F.R. § 4.187. Under its exclusive jurisdiction to enforce the SCA, the Department of Labor is charged with investigating any complaints filed by employees. If a violation of the Act is found, the Department of Labor may withhold from the contractor such funds as are necessary to pay the employees. *Id.* Only if such funds are not sufficient to remedy a violation of the SCA is the Secretary of Labor authorized to file suit to recover the funds necessary to make the employees whole under the Act. The SCA makes no provision for employees to file suit on their own behalf to recover for violations of the Act. Under this exclusive remedial regime, punitive damages and attorneys' fees are not available.

2. In 1991, petitioner entered into a contract with the Seventh Signal Command of the United States Army to provide operation and maintenance services for the administrative telephone system at Fort Polk, Louisiana. The contract incorporated the SCA by reference. Accordingly, respondents, who were employees of petitioner, were entitled to receive such wages and fringe benefits as

the Secretary of Labor determined to be prevailing in that locality. Petitioner continued to provide services under the contract until November 4, 1992, when the contract was "novated" to another services contractor, Dynamic Concepts, Inc. ("DCI"). Under the novation agreement, DCI "assumed all obligations and liabilities" of petitioner under the contract.

At the time the novation agreement was executed, respondents became employees of DCI. Prior to this agreement, respondents had accrued unused vacation days for which they sought payment from petitioner. Petitioner maintained, however, that under the terms of the novation agreement, DCI was liable for any accrued, unused vacation days and thus denied respondents' request for vacation pay in the aggregate amount of approximately $6,200. DCI was unwilling to make these payments and thus submitted this dispute to the Department of Labor pursuant to the remedial scheme established by the SCA. In conformance with these procedures, respondents also requested the Department of Labor to resolve this dispute and to require petitioner to make such payments. Specifically, on January 6, 1993, respondents wrote to the Department of Labor notifying the Department that "a formal complaint [is hereby] filed by the former manager and employees of Fidelity Technologies, Inc. regarding earned vacation time denied to us by [Fidelity]." App. 31.

On December 8, 1994, respondents commenced the instant litigation in the Thirtieth Judicial District Court of Louisiana. Respondents sought all wages and benefits owed but not yet paid under the contract, as determined by the SCA. Respondents also sought punitive damages

and attorneys' fees available under Louisiana law.[1] Specifically, respondents requested punitive damages in the amount of $150,000 – an amount twenty-four times greater than their actual damages. Shortly after the complaint was filed, the Department of Labor issued its decision that petitioner was liable for the unused vacation days. Petitioner promptly tendered the approximately $6,200 that respondents had sought. Respondents, however, declined to accept such payment.

3. Petitioner filed a declinatory exception in the district court on the ground that the court lacked subject matter jurisdiction. Petitioner maintained that in light of the exclusive administrative remedy available under the SCA, respondents did not have a private cause of action for a claim that was premised solely on a violation of the SCA.

The district court granted petitioner's motion and held that it had "no jurisdiction to adjudicate this particular matter." App. 17. As a threshold matter, the court noted that the contract between petitioner and respondents was governed by the SCA and thus fell within the

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[1] Under Louisiana Revised Statute 23:631 (App. 28), a discharged employee is entitled to be paid for any wages or benefits outstanding within three days of the discharge. If an employer fails to comply with this provision, it "shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages." Louisiana Revised Statute 23:632 (App. 30). Under this latter provision, reasonable attorneys' fees are also available.

scope of its remedial provisions. App. 16-17. The district court rested is conclusion on the D.C. Circuit's decision in *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), which held that an employee does not have a private right of action under the SCA and that the statutory administrative remedy is exclusive. The district court concurred and held that Congress had conferred "exclusive jurisdiction [on] the Department of Labor" to award relief for violations of the SCA. App. 17. The court elaborated:

> I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due.

App. 17.

4. The Louisiana Third Circuit Court of Appeal reversed, holding that respondents were entitled to bring their claims that rested upon violations of the SCA under state law and to press their claims for punitive damages and attorneys' fees. As an initial matter, the court noted that the SCA "does not explicitly nor implicitly address the issue of *non-payment*" of prevailing wages and fringe benefits. App. 6 (emphasis added). The court reached this conclusion without citing to or even mentioning the applicable regulations, which specifically state that the term "underpayments" under the Act "*includes non-payment.*" 29 C.F.R. § 4.187 (emphasis added). Secondly, the

court held that the SCA did not preempt Louisiana law compelling employers to pay the earned wages of an employee promptly after his dismissal. App. 11-12. The court stated that the Louisiana law allowing for the recovery of punitive damages and attorneys' fees served to effectuate the purposes of the SCA by ensuring that employees received the amount due under the Act. The court of appeals simply ignored the district court's conclusion that the administrative remedies provided by the SCA were exclusive and that respondents were thus disabled from enforcing the SCA under state law. The court of appeals made no reference to *Danielsen* or to the other federal appellate cases which have held that the remedies identified under the SCA are exclusive. *See, e.g., Miscellaneous Serv. Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981); *District Lodge No. 166, Int'l Ass'n of Machinists and Aerospace Workers v. TWA Serv., Inc.*, 731 F.2d 711 (11th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985).

Petitioner timely filed a petition for a writ of certiorari with the Louisiana Supreme Court. On March 21, 1997, the Louisiana Supreme Court denied the application for the writ.

REASONS FOR GRANTING THE WRIT

The Louisiana court's decision presents an important legal question regarding the nature of the remedies available under the SCA and similar federal statutes. That question is whether covered employees may circumvent the exclusive administrative remedy established under the SCA by asserting state law claims that are based

solely upon a violation of the Act. The court's holding will necessarily undermine the important interests furthered by the SCA's exclusive remedial provisions, which confer on the Department of Labor the sole authority to ensure that employees covered by the SCA receive wages equal to the prevailing rate in the place of performance. Specifically, Congress's establishment of a carefully circumscribed enforcement mechanism furthers the goals of efficient administration of the Act, centralized enforcement by an expert administrative agency, and limiting the amount of litigation necessary to enforce the statute.

This case also presents a stark conflict between the decision below and the federal circuit courts of appeals as to the proper scope of the remedies available under the SCA. Three federal courts of appeals and numerous district courts have addressed this issue, all uniformly acknowledging the exclusive nature of the remedy provided under the SCA. As a result, the federal courts have held that there is no private right of action under the Act and have consistently dismissed claims under other laws when premised on a violation of the SCA.

In contrast, the Louisiana court ignored the exclusivity of the remedy provided by Congress under the SCA and allowed respondents to assert a state law claim that is predicated on a violation of the Act. The court below failed to recognize that just as the exclusive nature of the Act's remedy compels a conclusion that there is no private right of action, so too it necessarily prohibits covered employees from bringing state claims that are premised on a violation of the SCA. As the D.C. Circuit held in *Danielsen*, plaintiffs cannot evade the carefully circumscribed remedies available under the SCA by

merely reformulating their claims under a different statute. Indeed, this Court has made clear on several occasions that a plaintiff may not evade an exclusive remedial scheme " 'by the simple expedient of putting a different label on the pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). As the federal courts have recognized, the language and structure of the Act demonstrates that Congress intended the administrative remedy established thereby to be exclusive. Since the SCA's remedy is exclusive, it preempts state law claims premised on SCA violations just as it forecloses federal claims which seek to evade the SCA's remedial scheme.

If not corrected, the decision below will introduce considerable confusion into the enforcement of the SCA. Allowing covered employees to pursue punitive damages and attorneys' fees under state law will render the enforcement mechanisms established by Congress entirely obsolete. No plaintiff will pursue the limited remedies available under the federal statute when a more generous measure of damages is available under state law. In this case, for example, respondents seek punitive damages that are 24 times greater than the damages awarded to them by the Department of Labor. Conflicting results would arise not only between states but even under the same contract if one employee invoked the administrative remedies available under the federal statute and another employee brought suit in state court. Furthermore, the anomalies created by this conflict between the Louisiana courts and the federal courts must be understood in the broader context of the panoply of virtually identical federal statutes, such as the Davis-

Bacon Act, which have themselves been subject to similar misinterpretation. This case presents the Court with the opportunity to resolve this substantial conflict.

I. The Decision Below Is Plainly Erroneous And Is In Conflict With The Decisions Of Three Federal Courts of Appeals.

The decision of the Louisiana court allows employees of federal servicing contractors to assert state law claims that are premised solely on a violation of the SCA. Respondents' state law claim was for unpaid wages and benefits, and related penalties. Obviously, this claim is entirely dependent on determining the wages and benefits owed under their contract with petitioner, which itself is governed by the SCA.[2] The Louisiana court failed to acknowledge the exclusive nature of the SCA's remedial provisions and thus allowed respondents to maintain

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[2] The court below sought to avoid this conclusion by stating that "[t]he SCA does not explicitly nor implicitly address the issue of non-payment." App. 6. Yet, the distinction drawn by the Louisiana court is utterly specious. It is obvious that an employee is *underpaid* by any amount that the employee is *not paid*. In any event, it is inconceivable that Congress sought to ensure that employees of federal servicing contractors were not underpaid, but was indifferent to whether such employees were paid at all. Not surprisingly, the regulations confirm that the SCA's protection against underpayment includes non-payment of such employees. *See* 29 C.F.R. § 4.187 ("any violations of any of the contract stipulations required [by the SCA] shall render the party responsible liable for the amount of any deductions, rebates, refunds, or *underpayments (which includes non-payment)* of compensation due to any employee engaged in the performance of the contract.") (emphasis added).

their state law claim for penalties for non-payment of the wages and benefits owed, and attorneys' fees. Thus, the decision below is plainly inconsistent with the structure and purpose of the SCA's enforcement provisions, and with the decisions of three federal courts of appeals.

Under the SCA, an aggrieved employee of a federal servicing contractor has one, and only one, available remedy. Namely, the employee may file a complaint, as respondents did here, with the Department of Labor pursuant to 29 C.F.R. § 4.191. The Department alone can enforce the statute by withholding from the relevant agencies any amounts owed to the contractor that would satisfy its obligations to its employees. If such withholding will be insufficient or is not possible, the Department is authorized to bring suit against the contractor for the amount owed.

As this framework suggests, Congress in enacting the SCA established a carefully circumscribed remedial scheme to be administrated by a centralized expert agency in a uniform manner. The Louisiana court's decision runs afoul of this Court's well-established rule of statutory construction:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . [I]t is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another.

Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297, 301 (1943) (citations omitted). *See also Northwest*

Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 94 (1981) ("It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress."); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particularly remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' ") (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)).

The Louisiana court ignored the careful balance struck by Congress in enacting a comprehensive and specific remedial scheme under the SCA. The state court's decision enforcing a state-law right of action based on a violation of the SCA is flatly inconsistent with directly analogous decisions of three federal courts of appeals.

In *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), employees sought to bring a claim based upon violations of the SCA under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and under a state common law fraud theory. The court dismissed the complaint on the ground that "the remedy provided in the SCA is *exclusive*." *Id.* at 1222 (emphasis added). Starting from this premise, the court concluded that there was no private right of action under

the SCA. *Id.* at 1228. In applying the four-fold test articulated in *Cort v. Ash*, 422 U.S. 66 (1975),[3] the court focused on the second factor relating to whether there is any indication of a legislative intent to create such a remedy. The court concluded that "*[n]othing* in the language of the SCA provides any indication that Congress intended to create a private cause of action." *Id.* at 1227 (emphasis added). Moreover, the court held that such a remedy "would be so inconsistent with the legislative scheme underlying the right as to be unthinkable." *Id.* The court reasoned that where Congress has established a "comprehensive administrative" enforcement mechanism, such specification "normally excludes duplicative judicial jurisdiction." *Id.* (internal citations omitted).

The D.C. Circuit also noted that a contrary conclusion would effectively eviscerate the enforcement mechanisms established by Congress. The court queried:

> "[W]hat plaintiff will pursue his administrative remedies under the Act where more direct and

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[3] Specifically, in determining whether an implied right of action exists under a statute, the Court asks (1) whether the plaintiff is one of a class for whose special benefit the statute was created; (2) whether there is any indication of a legislative intent to fashion such a remedy; (3) whether it is consistent with the underlying legislative scheme to apply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law so that an implied federal cause of action would be inappropriate. *Id.* As the Court's more recent pronouncements make clear, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)).

> expeditious relief is available in a private suit?" How much more the case where plaintiffs couch their complaint in terms of RICO to give them, not a remedy equal to that provided under the SCA, but three times that remedy? How much more still where their attorneys would be extracting their fees not from their clients but from the other side? Thus, the ingenious pleading of the action in RICO terms rather than in straight SCA language cuts against the implication of the right of action rather than in its favor.

Id. at 1228 (quoting *Miscellaneous Service Workers*, 661 F.2d 776, 781 (9th Cir. 1981)). In the D.C. Circuit's view, these practical considerations strongly counseled against undermining the SCA's exclusive remedial scheme by finding an implied right of action.

In the instant case, these same considerations demonstrate the dramatic effect that the Louisiana court's ruling will have. Here, respondents seek damages 24 times greater than those which were awarded to them by the Department of Labor. Their attorneys also seek their fees from petitioner. With such a financial bonanza available under state law, few employees indeed will submit their claims to the Department of Labor.

The D.C. Circuit's decision is particularly instructive because plaintiffs sought to cloak their claims, which were premised on a violation of the SCA, under a separate statutory cause of action. The court noted that "[t]he factual allegations are precisely the same" under both the SCA and RICO. Accordingly, it concluded that "[t]o frame the action . . . in terms of RICO adds nothing." *Id.* at 1228. Thus, the D.C. Circuit foreclosed plaintiffs from circumventing the exclusive administrative remedies

established under the SCA by pleading their claims for unpaid wages and benefits, and related penalties, under a different statute.

In reaching this result, the D.C. Circuit closely followed the Ninth Circuit's decision in *Miscellaneous Serv. Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981). Starting from the proposition that "Congress intended to provide for exclusive administrative enforcement of the SCA," the Ninth Circuit held that there is no private right of action under the Act. *Id.* at 780. In analyzing whether to imply a private right of action under *Cort v. Ash*, the Ninth Circuit stated: "The Act does not specifically grant a private right of action, and nothing in its language or history compels us to believe that such a right may be implied. On the contrary, *a plain reading of the statute evidences a clear legislative intent to restrict employee remedies under the Act to administrative channels.*" *Id.* at 779 (emphasis added). In addition to its conclusion that "nothing supports an inference of a legislative intent to create private remedies under the Act," the Ninth Circuit reasoned that "it would be flatly inconsistent with the express provision of a limited governmental cause of action to imply a wide ranging private right of action as an alternative to a government suit." *Id.* at 780 (citing *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297, 301 (1943)). Since its decision in *Miscellaneous Services Workers*, the Ninth Circuit has reaffirmed its conclusion that no private right of action exists under the SCA. *See, e.g., Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994).

The other federal courts to have considered this issue have uniformly upheld the SCA's exclusive remedial scheme by refusing to imply a private right of action

upon employees covered by the Act. In *District Lodge No. 166 v. TWA Serv., Inc.*, 731 F.2d 711 (11th Cir. 1984), the Eleventh Circuit endorsed the Ninth Circuit's reasoning in *Miscellaneous Service Workers*. Specifically, the Eleventh Circuit noted that the legislative history of the SCA made it clear that the administrative enforcement mechanism was intended to be exclusive and to foster "more efficient administration" of the Act. *Id.* at 715 (quoting S. Rep. No. 1131, 92d Cong., 2d Sess. 5 (1972)). The court also noted that the Senate Report emphasized Congress's desire to provide for "expeditious" decisions on complaints by employees. The court held that implying a private right of action would undermine these congressional objectives.[4]

As these cases illustrate, the federal courts have identified several important policies that are furthered by

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[4] The district courts that have considered this issue have uniformly reached the same conclusion. *See, e.g., Foster v. Parker Transfer Co.*, 528 F. Supp. 906 (W.D. Pa. 1981) (declining to find a private right of action and dismissing complaint because, "[a]lthough the plaintiffs styled this case as a diversity action, it is clear that the gravamen of their complaint is that they were not paid by the defendant in accordance with the [SCA]"); *Nichols v. Mower's News Serv., Inc.*, 492 F. Supp. 258, 261 (D. Vt. 1980) (dismissing suit for nonpayment of wages in connection with a contract subject to the SCA because the Department of Labor has "sole authority for enforcing the Act"); *Oji v. PSC Envtl. Management Inc.*, 771 F. Supp. 232, 234 (N.D. Ill. 1991) (dismissing diversity suit alleging breach of a contract governed by the SCA because the court acknowledged that "the Secretary of Labor . . . has exclusive jurisdiction to enforce the SCA" and thus "agree[d] with the conclusion of the Ninth and Eleventh Circuits that the SCA neither explicitly nor implicitly authorizes a private cause of action").

Congress's selection of an exclusive administrative remedy for violations of the SCA. Each of these policies will be substantially undermined, if not totally negated, by the Louisiana court's decision below. Specifically, the federal courts have noted that the legislative history is clear that Congress intended its enforcement mechanism to further the "efficient administration" of the Act. *See District Lodge No. 166*, 741 F.2d at 715. Far from advancing the efficient administration of the SCA, however, the decision below would ensure that violations of the SCA would now be pursued and resolved in each of the fifty states. Of course, if employees were able to bring suit in each state, there would be a maze of different interpretations and remedies available for violations of the SCA, which would in turn undermine an efficient and uniform application of the Act. Furthermore, it is clear from the statute's structure that Congress intended to minimize litigation resulting from violations of the SCA. As the Ninth Circuit noted in *Miscellaneous Service Workers*, 661 F.2d at 780, even the Department of Labor has only a contingent right to bring suit to enforce the Act. Yet, by allowing employees to receive punitive damages and attorneys' fees under state law, the Louisiana court's decision all but ensures that employees will disregard the federal administrative remedy and will pursue their claims in state court. The litigation explosion that would be engendered by such a rule directly undermines Congress's attempt to minimize litigation enforcing the Act.[5]

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[5] It should be noted that the SCA is only one of over 55 federal statutes, including the Davis-Bacon Act, aimed at ensuring that employees of federal contractors receive prevailing wages, and thus the effect of the Louisiana court's

Moreover, if the Louisiana court's decision below is allowed to stand, it is virtually assured that federal service contractors will be subject to conflicting liability depending upon which state court they are sued in. In essence, the decision below establishes a dual enforcement regime in which employees may select the forum (state court or the Department of Labor) which yields the most advantageous resolution of their claims.

Indeed, the lower court's ruling poses the direct potential for inconsistent judgments in the same case, since the state court could disagree with the Labor Department's conclusion on the wages and benefits owed.[6] Here, respondents have availed themselves of this

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decision has broad significance. Indeed, at least one state court has found an implied private right of action under the Davis-Bacon Act despite federal appellate decisions to the contrary. *Compare Stampco Constr. Co., Inc. v. Guffey*, 572 N.E.2d 510 (Ind. App. 1991) (implied private right of action under Davis-Bacon Act) *with Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309 (5th Cir. 1980) (finding no such right).

[6] As noted above, the instant suit was brought before the Department of Labor's ruling was issued, and the Louisiana court found that the SCA did not address nonpayment of wages. Thus, the decision below did not rely in any way upon the Department's determination of liability. Under the lower court's rationale, a state could determine the wages owed under the SCA and need not await a decision from the Department of Labor. Moreover, even if the state court did defer to the Department in cases where the statutory remedy was invoked, employees would still be able to seek supplemental state law remedies. Thus, the Louisiana statute operates as a retroactive penalty upon employers who abide by the SCA's enforcement mechanism. The availability of punitive damages seriously disrupts the remedial scheme established under the SCA.

very tactic by pursuing their claims before *both* the Department of Labor and the Louisiana state courts. Beyond the conflicting results from the state courts that would result if the Louisiana court's interpretation of the SCA is maintained, conflicting remedies might be awarded under the same contract. For example, respondents were awarded $6,200 by the Department of Labor in connection with the complaint they filed. If they had adhered to the Department's determination of liability, that is all they would have received. Yet, if other employees of petitioner had sought damages in Louisiana state court, they might receive monetary penalties 24 times that amount, as well as attorneys' fees. Such an absurd result is flatly inconsistent with the exclusive enforcement mechanism that Congress established under the SCA.

II. The Decision Below Incorrectly Applied Settled Principles Of Preemption.

Rather than adhering to this unbroken line of federal appellate decisions, the court below refused to acknowledge the exclusivity of the administrative remedy provided by the SCA. In determining that the SCA does not preempt respondents' claim, the court disregarded the important congressional purposes behind the SCA's uniform, centralized enforcement mechanism. Thus, the Louisiana court's reasoning cannot be reconciled with either the federal decisions cited above or traditional preemption analysis.[7]

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[7] As a threshold matter, we note the close relationship between the concepts of preemption and implied private rights

Respondents' claim necessarily implicates and rests solely upon a violation of the SCA. To be sure, respondents invoke Louisiana state law and maintain that petitioner violated state law by not paying them in a timely manner for the vacation time they had accrued at the time of their discharge. Yet, in determining the validity of this claim, namely how much respondents are owed and by whom, the court's analysis is entirely dependent upon the SCA, which was incorporated into the contract at issue here. The SCA governs both the amount that respondents are due and the party that is liable for such amount. Indeed, respondents acknowledged as much when they filed their complaint with the Department of Labor. Given that respondents' claim rests solely upon their rights under the SCA, "to frame the action . . . in terms of [state law] adds nothing." *Danielsen*, 941 F.2d at 1228. If a contrary rule were permitted, "the crucial administrative role that [the Department of Labor] . . . was given by Congress . . . would be eliminated 'by the simple expedient of putting a different label on (the) pleadings.' " *Brown v. General Serv. Admin.*, 425 U.S. at 833

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of action. Indeed, the D.C. Circuit in analyzing the exclusive nature of the SCA's remedial scheme recognized the somewhat "inconsistent" usage of the term preemption in the context of federal labor law. *Danielsen*, 941 F.2d at 1227. For example, the Court in *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge*, held that the National Labor Relations Act "preempts state and *federal* court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." 403 U.S. 274, 276 (1971) (emphasis added). *Cf. Foster*, 528 F. Supp. at 906 (dismissing diversity common law contract suit based on violation of the SCA under implied private right of action analysis).

(quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973)). *See also, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) (preempting labor-contract claims brought under state tort law because "[a]ny other result would elevate form over substance and allow parties to evade the requirements of the [Labor Management Relations Act] by relabelling their contract claims as claims for tortious breach of contract."). In short, respondents should not be allowed to circumvent the exclusive administrative remedies of the SCA by reformulating their claims under state law.

As a result of its failure to acknowledge the exclusivity of the SCA's remedial scheme, the Louisiana court's preemption analysis is seriously flawed. It is well-established that in determining the preemptive effect of a federal statute, " '[t]he purpose of Congress is the ultimate touchstone.' " *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. Light Motor Corp.*, 435 U.S. 497, 504 (1978)). In considering the congressional intent behind the SCA, the Louisiana court below merely stated: "Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state." App. 12. Essentially, the court reasoned that allowing employees to bring suits under state law for punitive damages and attorneys' fees furthers the purposes of the SCA by punishing federal contractors that violate the statute. Yet, the court's analysis fails to acknowledge the important congressional purposes inherent in the exclusive remedial scheme established under the SCA. As noted above, the structure

of the Act and the legislative history make clear that this enforcement act mechanism was aimed at insuring the "efficient administration" of claims arising under the Act. By vesting the Department of Labor with the sole authority to enforce the Act, Congress sought to maintain a uniform remedial scheme. Moreover, the structure of the Act, specifically the limited public cause of action conferred and the lack of a private cause of action, demonstrate that Congress sought to minimize the amount of litigation arising under the Act. The Louisiana court's decision directly undermines each of these important congressional purposes. By allowing plaintiffs to seek substantial punitive damages and attorneys' fees, the court's decision virtually insures that the carefully crafted administrative enforcement mechanism provided by the Act will be rendered obsolete. Thus, far from furthering the purposes of the SCA, the decision below is at war with the administrative enforcement mechanism established by Congress.

The Louisiana court's decision runs afoul of two distinct lines of this Court's preemption cases. *See Building and Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224-25 (1993) (describing the separate lines of preemption analysis that have been applied to federal labor law). In *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court held that state courts are preempted from awarding damages in connection with activities regulated by the National Labor Relations Board ("NLRB"). Noting that Congress had established an exclusive forum for resolving disputes under the National Labor Relations Act ("NLRA"), the Court explained the significance of

this exclusive process for adjudicating disputes under the NLRA in terms that are equally applicable to the exclusive enforcement mechanism established under the SCA:

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . . "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . . "

Id. at 242, 243 (quoting *Garner v. Teamsters*, 346 U.S. 485, 490-91).

Just as Congress determined that the NLRB had "exclusive competence" over matters arising under the NLRA, so too the Department of Labor has been designated as the exclusive adjudicatory forum for resolving disputes under the SCA. *Id.* at 245. By allowing respondents to enforce their state law claims based solely on

violations of the SCA, the Louisiana court transgressed this Court's admonition that to "allow two law-making sources to govern" in an area of exclusive federal policy is impermissible. *Id.* at 247.

Additionally, the Louisiana court's decision upsets the careful balance struck by Congress in determining the remedies available under the SCA by authorizing employees to receive punitive damages and attorneys' fees. This Court has repeatedly preempted state laws where they "would interfere with Congress' integrated scheme of regulation by adding a remedy to those prescribed by [an exclusive remedial scheme]." *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 287 (1986) (internal citations omitted). Likewise, in *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court noted that by defining the "economic sanctions" available under the NLRA, "Congress struck the balance . . . between the uncontrolled power of management and labor to further their respective interests." *Id.* at 146 (internal citations omitted). The Court held that to confer an additional "economic weapon" on an employee impermissibly disturbed this balance and therefore would be preempted. *Id.* at 147. Here, the Louisiana court's decision arms employees covered under the SCA with the right to seek punitive damages and attorneys' fees for violations of the Act and thus dramatically undermines the balance struck by Congress. Indeed, if the decision below is allowed to stand, employers will not be willing to submit SCA disputes to the Department of Labor because doing so would entail the risk of incurring automatic penalties under the Louisiana statute if liability is

ultimately found.[8] Thus, the Louisiana court's decision is fundamentally inconsistent with and significantly alters the balance struck by Congress under the SCA.[9]

Finally, we note that when confronted with similar attempts to circumvent exclusive remedies established by Congress, this Court has consistently held that such

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[8] The Louisiana statute penalizes employers who fail to pay wages owed discharged employees promptly. The employees are awarded damages for each day (up to 90 days) that they do not receive the unpaid wages. Thus, when a dispute arises under the SCA and is submitted to the Department of Labor for resolution, the employer will automatically be penalized for each day (up to 90 days) that it takes the Department to reach a determination. Here, respondents seek from petitioner damages 24 times greater than those that were awarded by the Department of Labor. Thus, if the state law is not preempted, petitioner will be subject to this automatic penalty merely as a result of adhering to the Act's remedial enforcement procedures. In contrast, employees face no penalty under the Louisiana statute if the employer ultimately prevails.

[9] The court's decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), is not inconsistent with the line of cases implicated here. Unlike the Department of Labor under the SCA, the arbitration procedures under the collective bargaining agreement at issue in *Livadas* clearly were not intended to be an exclusive forum for resolving disputes. Indeed, the Court noted that "[n]either party here argues for application of the rule of [*Garmon*]. . . . " *Id.* at 117 n.11. Furthermore, the collective bargaining agreement at issue in the *Livadas* case did not purport to represent an exclusive remedial scheme or source of rights, and thus the California statute at issue there did not disturb a careful balance struck by Congress. Of course, to the extent there is any uncertainty as to the applicability of *Livadas* to what federal courts have uniformly found in the Service Contract Act's exclusive scheme, this is an additional reason why this Court should review the decision below.

claims are preempted. For example, in *Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971), the Court held that the NLRA "preempts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." In that case, the Court precluded a former member of a labor union from pursuing a claim of improper discharge for membership under state law because such suits would undermine the "comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency. . . . " *Id.* at 286. *See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211 (preempting state law tort action alleging bad faith in handling a disability claim because such suits would undermine the uniformity of federal labor law). Similarly, this Court has rejected attempts to evade the exclusive remedy provided by Congress under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 485 (1990). The Court has refused to allow plaintiffs to proceed under state law where such claims would "completely undermine" the "comprehensive civil enforcement scheme" established by Congress. *Id.* The decision below cannot be reconciled with these decisions and should not be allowed to stand for this reason as well.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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June 19, 1997

THE SUPREME COURT OF THE STATE OF LOUISIANA

LONNIE B. BUTLER, ET AL

VS. NO. 97-C – 0251

FIDELITY TECHNOLOGIES CORPORATION

IN RE: Fidelity Technologies Corp.; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Vernon 30th Judicial District Court Div. "B" Number 55,876A; to the Court of Appeal, Third Circuit, Number CA96-0821.

March 21, 1997

Denied.

JPV
PFC
WFM
HTL
CDK
CDT
JTK

JOHNSON, J. not on panel.

Supreme Court of Louisiana
March 21, 1997

/s/ _____
Clerk of Court
For the Court

THIRD CIRCUIT, COURT OF APPEAL
STATE OF LOUISIANA
NUMBER 96-821

LONNIE B. BUTLER ET AL.

Plaintiffs-Appellants

VERSUS

FIDELITY TECHNOLOGIES CORPORATION

Defendant-Appellee

On Appeal from the Thirtieth Judicial District Court, Parish of Vernon, the Honorable Roy B. Tuck, Jr., District Judge presiding.

Before THIBODEAUX, PETERS, and GREMILLION, Judges.

GREMILLION, Judge.

The plaintiffs, former employees of the defendant, Fidelity Technologies Corporation, appeal the trial court's judgment sustaining Fidelity's exception of lack of subject matter jurisdiction. For the following reasons, we reverse and remand this matter to the trial court for further proceedings.

FACTS

On March 1, 1991, Fidelity entered into a contract with the Seventh Signal Command of the United States Army to provide operation and maintenance services for the administrative telephone system at Ft. Polk, Louisiana. Because the subject matter of the contract is the

provision of services to the Federal Government, it is governed by the mandates of the Service Contract Labor Standards Act (SCA), 41 U.S.C. § 351, which ensures that service employees working on government contracts are paid the prevailing wages paid in the locality by non-governmental contractors. The wage and benefit determinations are made by the Department of Labor under the direction of the Secretary of Labor by surveying the wages for similar jobs in the locality. Fidelity provided the operation and maintenance services from April 1, 1991 until November 4, 1992, when Fidelity novated the contract to Dynamic Concepts, Incorporated (DCI), who then succeeded to all of Fidelity's duties and responsibilities under the contract.

At the time of the novation, the plaintiffs were employees of Fidelity. On November 4, 1992, the date DCI assumed all of Fidelity's responsibilities, they became employees of DCI and on November 5, 1994, they were promptly discharged. At this time, the plaintiffs had accrued unused vacation days and they made timely demand to be paid all wages and benefits due. However, a dispute arose over whom, Fidelity or DCI, was responsible for payment of this vacation time. Fidelity and DCI were unable to negotiate a resolution to this dispute and thereafter submitted their dispute to the United States Department of Labor, Wage and Hour Division, for resolution as required by the SCA. On January 6, 1993, the plaintiffs requested intervention by the Department of Labor in this dispute. The plaintiffs allege that they never received a response to this request.

On December 4, 1994, the plaintiffs instituted the present litigation against Fidelity pursuant to La.R.S.

23:631 and 632. La.R.S. 23:631 provides that upon discharge, the employer has the duty to pay the employee the amount of the wages due under the terms of employment within three days of the discharge. Failure to pay or tender payment subjects the employer to liability in the amount of either ninety days wages at the employee's daily rate or full wages from the time of demand until the employer pays or tenders payment, whichever is the lesser amount. La.R.S. 23:632. In addition, reasonable attorney fees are available to the employee in the event it is necessary to file suit to collect the unpaid wages. *Id.*

On March 14, 1995, Fidelity filed an exception to subject matter jurisdiction alleging that because the contract between it and the Seventh Signal Command incorporated the SCA, state law is preempted and the exclusive remedy available to the plaintiffs is administrative relief through the United States Department of Labor. The hearing on this motion was held on February 23, 1996, wherein the trial court sustained the exception finding that the SCA preempted state law.

ASSIGNMENT OF ERROR

The plaintiffs have appealed alleging that the trial court erred in holding that the Service Contract Act of 1965 preempts a state law claim arising out of an employer's failure to pay its employees all amounts due within seventy-two hours of termination.

PREEMPTION

The United States Supreme Court clearly set forth the standard for federal preemption under the Supremacy Clause of the United States Constitution in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992):

> Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, since our decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with federal law is "without effect." Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of preemption analysis.
>
> Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "

(citations omitted).

"Preemption is not to be presumed lightly. In fact, there is typically a presumption weighing against preemption to insure that neither the Congress nor the courts unintentionally or unnecessarily disturb the federal-state balance." *Huntleigh Corp. v. Louisiana State Board of Private Security Examiners,* 906 F.Supp. 357, 360 (M.D. La. 1995). The historic police powers of the states are not to be superseded by federal acts unless it is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146 (1947). To determine whether a state statute is preempted by federal statute, the court must first determine the construction of the two statutes and then resolve the question of whether the state statute interferes with the accomplishment and execution of the full purposes and objectives of Congress. *Tenneco, Inc. v. Sutton,* 530 F.Supp. 411 (M.D. La. 1981). "Thus, where a state and the Congress enact similar legislation, the Court must review the history and purpose of the federal regulation to determine whether the Congress intended to pre-empt the state legislation and regulate the area in question." *Id.* at 433, 434.

DISCUSSION

Fidelity argues that the courts do not have jurisdiction over this action because the plaintiffs' exclusive remedy for non-payment is the administrative remedy provided by the SCA and the regulations enacted pursuant to that Act. We disagree. The SCA does not explicitly nor implicitly address the issue of non-payment. The Revision Notes and Legislative Reports of the SCA provides that "[t]he purpose of this bill is to provide labor standards for the protection of employees of contractors

and subcontractors furnishing services to or performing maintenance service for Federal Agencies." From a reading of the SCA and the historical notes, one finds that the main thrust of the act is to ensure that employees of contractors or subcontractors furnishing services for Federal Agencies are paid no less than the prevailing rate in the locality, including fringe benefits, and that the work will not be performed under unsafe or unsanitary conditions.[1] If the employer fails to provide such, the Federal

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[1] § 351. Required contract provisions: minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500 except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such

Agency may withhold payment under the contract; sue to recover underpayments; cancel the contract; and prohibit the offending firm from receiving further contracts with the Federal Agency for up to three years.[2]

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agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

41 USCA § 351 (1996).

[2] 41 USCA §§ 352-354 (1996) provide the following:

§ 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued

In their complaint, the plaintiffs do not allege that the employment contract with Fidelity fails to comply with

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payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract: contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

§ 353. Law governing authority of Secretary

(a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact and take other appropriate action hereunder.

(b) Limitations and regulations allowing variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation,

the wage and benefit requirements of the SCA. What they do allege, however, is that they were not paid these

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variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) Predecessor contracts; employees wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Duration of contract

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

benefits and they sought recourse under La.R.S. 23:631 and 632.

The purpose of La.R.S. 23:631 and 632 is to compel the employer to pay the earned wages of an employee promptly after his dismissal or resignation. In contrast, the SCA's purpose and objective is to ensure that federal service contract employees are treated equally with

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(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

employees in that locality by requiring the contractor to pay the prevailing wage and benefits. La.R.S. 23:631 and 632 do not prevent or interfere with the attainment of these federal goals. In fact, 23:631 and 632 help to effectuate the SCA. Depriving Louisiana employees of this remedy would be inconsistent with the objectives of the SCA when the SCA seeks to ensure that these same employees are guaranteed the same benefits as other employees in the same locality and state. As such we find that the SCA does not preempt La.R.S. 23:631 and 632 and reverse the judgment of the trial court.

CONCLUSION

The judgment of the trial court sustaining Fidelity Technologies Corporation's Declinatory Exception of Lack of Subject Matter Jurisdiction is reversed and this matter is remanded to the trial court for further proceedings. The costs of this appeal are assessed against Fidelity Technologies Corporation.

REVERSED AND REMANDED.

* * *

[p. 17] Opinion of the Thirtieth Judicial District Court of Louisiana

BY THE COURT:

Very well. I'm going to note that the facts in this matter as I understand them are simply these, that the defendant, Fidelity Technologies Corporation entered into a contract with the United States Government, particularly the United States Army, for the purposes, primarily, without detailing the contract, of providing services for, that is repairs and maintenance and operation of a telephone system, an administrative telephone system owned by the United States Government, that is by the United States Army at Fort Polk. It really has nothing to do with this matter, they, likewise, entered into a contract to service and operate some facilities owned by the Government at other locations other than Fort Polk. My further understanding of the facts are that they began performance under the terms of that contract on or about April 1, 1991 and they continued to perform under that contract for some period of time. The persons who are plaintiffs in this lawsuit were employees of that defendant and Fidelity Technologies Corporation and primarily most of them, I believe, worked throughout the period of time from roughly April until some time in November of 1992. It appears that after this matter had begun that Fidelity Technologies Corporation determined that they were not making a profit, in other words, that they were not able to carry on and continue to perform this service profitably and they began to seek some manner in which to relieve themselves of the obligations they assumed

under the terms of that contract. They did this by way of a novation. Under the terms of the novation, [p. 18] that is an agreement entered into by Fidelity Technologies Corporation, Dynamic Concepts, Inc. and the United States Government, they transferred their interest in this contract to Dynamic Concepts, Inc. The act of novation provides that the transfer would be effective as of November 1, 1992. It makes the further provision that as of November 1, 1992, the transferor, and the transferor in this case would be Fidelity Technologies Corporation, has transferred to the transferee, who would be Dynamic Concepts, Inc., contract and the number is then spelled out of the transferor by virtue of a novation agreemént between the transferor and the transferee. The further provision is made that, and this is in paragraph 3 in the beginning of the novation, that the transferee has acquired all rights to the contract of the transferor by virtue of the above transfer. In 4 it's provided that the transferee, Dynamic Concepts, Inc., has assumed all obligations and liabilities of the transferor under the contract by virtue of the above transfer. It appears that this novation was executed by and between the parties on or about October 30, 1992, that Dynamic Concepts, Inc. did, in truth and in fact, commence the operation but that Fidelity Technologies Corporation continued until about November 4 in getting the transfer and the logistics of the transfer worked out. As of that time and the evidence before me does not make quite clear, I assume from pleadings and from other information that I find in the record that some of these employees, a good number of them, continued to work for Dynamic Concepts, Inc. In

other words, their employment with Fidelity Technologies Corporation ended and their employment with Dynamic Concepts, Inc. began. The evidence would appear clearly to establish that there was never any break in their employment, there was never any break in their pay. The dispute that arose in this case was who, as between Fidelity Technologies Corporation and Dynamic Concepts, Inc., was [p. 19] responsible for unused, unpaid for vacation time that had accrued prior to these persons being placed on the payroll of Dynamic Concepts, Inc. I'm not sure if I had looked, as counsel, at the terms of the novation that I would not have referred to 4 and said that the transferee has assumed all obligations and liabilities of the transferor under the contract by virtue of the above transfer. I'm not sure that I would have said that nor that I wouldn't have said that. Be that as it may, certainly it is reasonable to construe that provision as, at least, implying that Dynamic Concepts, Inc. had assumed whatever obligations may have arisen under the terms of this contract on the part of Fidelity Technologies Corporation. And, of course, it would include the responsibility for making certain that employees were compensated. Be that as it may, it develops that what happened was that this matter was referred to the Department of Labor. The Department of Labor ultimately determined that Fidelity, in truth and in fact, was responsible for paying the vacation pay. Now, this was not introduced in evidence this afternoon, but, it's the – the record is replete with this and I believe that it's fair to indicate that Fidelity at some time, not immediately, but, at some time subsequent to being informed of this determination, in truth and in fact, tendered on a date in March of 1995, March 1 or March 5,

I've forgotten the date now, tendered the vacation pay that had not been paid. I do not have before me a ruling – a determination date to determine what took place, but, be that as it may, that tender was made after that determination was made. This suit was filed under the provisions of Title 23 Section 631 and 632 of the Louisiana Revised Statutes seeking to recover the alleged vacation pay due with penalties and attorney's fees. The penalties and attorney's fees apparently not having been allowed, not being permissible under the determinations by the Department of Labor, but, being [p. 20] provided for under the Louisiana Statue. The exception filed herein is one that says that under the Services Contract Act these matters are governed and are reposed entirely within the Department of Labor and that this court lacks jurisdiction to apply the Louisiana law to this particular dispute. I note, and, I'm referring particularly to the *Danielsen* case which is reported at 746 F.Supp. 170 and I'm referring particularly to language contained on page 175 of that decision where it's said, the purpose of the SCA, that is the Service Contract Act and I added that, was to ensure that service employees working on Government contracts are not paid wages below the prevailing wages being paid in the locality by non-government contractors. Thus, Section 2 of the Act requires the inclusion of specific provisions establishing minimum wage and fringe benefit levels in contracts entered into by the United States in excess of twenty-five hundred dollars. The principle purpose of which is to furnish services in the United States through the use of service employees. As I consider the facts in this case, I'm of the opinion that the specific purpose of the contract entered into initially by Fidelity

was to furnish services in the United States through the use of service employees, that is, employees to operate and service the administrative telephone system owned by the Untied States Government at Fort Polk. So, I believe to that extent we come within those provisions. The next question arises, is the Services Contract Act limited to wage levels only. The court is of the opinion that the language indicates that it is not so limited and that it includes fringe benefits and that the payment of vacation time is, in truth and in fact, fringe benefits. We then find that the wage and fringe benefit determination is specifically directed to the responsibility of the Secretary of Labor in accordance with prevailing rates for such employees in the locality. In short, I do not agree with a [p. 21] system that would appear to deprive litigants of a right to access to the courts. Nevertheless, I believe that is precisely what the Congress has attempted to do in this case by according exclusive jurisdiction in the Department of Labor to make these determinations. I do not believe, under those circumstances, that it's appropriate for this court to undertake to make that determination applying the law of the State of Louisiana as opposed to applying the determinations made by the Department of Labor both as to the prevailing rates and fringe benefits which would be due and as to compliance with the obligation imposed to pay the wages and fringe benefits which would be due. I do not necessarily like the decision that I am making, be that as it may, I believe that the exception is good under those circumstances and I'm going to maintain the exception and hold that this court has no jurisdiction to adjudicate this particular matter. Gentlemen, do

you understand what I have said? I'm not sure anybody else will.

LONNIE B. BUTLER, AUDREY M. ANDERSON, ROBERT H. ARMER, W. L. BASCO, JR., LINDA KAY BEHAN, JAMES W. BRYANT, LOYIL W. CRYER, WAYNE DUNN, KARAN M. MAHLEN, JOSEPH T. MARTIN, MARGARET H. MAYO, FRANCES R. MELCHIORRI, DONALD R. SAVANT, RAMONA SMART, AND HAROLD D. STAPLES	)	NUMBER 55,876A
VERSUS	)	(Filed Mar. 4, 1996)
FIDELITY TECHNOLOGIES CORPORATION	)	VERNON PARISH, LOUISIANA

JUDGMENT

Fidelity Technologies Corporation's declinatory exception of lack of subject matter jurisdiction came on for hearing before this Court on Friday, February 23, 1996. Counsel for all parties were present. Having reviewed the evidence presented and considered the law and argument presented by counsel for plaintiffs and defendant, for reasons orally assigned in open court on Friday, February 23, 1996:

IT IS HEREBY ORDERED, ADJUDGED and **DECREED** that defendant's declinatory exception of lack of subject matter jurisdiction be and the same hereby is **GRANTED** and plaintiffs' petition is dismissed, at plaintiffs' cost, for lack of subject matter jurisdiction.

THUS DONE and SIGNED this 5th day of March, 1996.

/s/ Roy B. Tuck
ROY B. TUCK
DISTRICT JUDGE

Submitted by:
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Approved as to form:
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ATTORNEYS FOR PLAINTIFFS

41 U.S.C. § 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

> **(1)** A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.
>
> **(2)** A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for

in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

* * *

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of Title 29.

* * *

41 U.S.C. § 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

* * *

41 U.S.C. § 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

29 C.F.R. § 4.187 Recovery of underpayments.

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary or his or her authorized representatives, an Administrative Law Judge, or the Administrative Review Board, and are not paid directly to such employees by the contracting agency without the express prior consent of the Department of Labor.

* * *

(c) Section 5(b) of the Act provides that if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to the Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. The Service Contract Act is not subject to the statute of limitations in the Portal to Portal Act, 29 U.S.C. 255, and contains no prescribed period within which such an action must be instituted; it has therefore been held that the general period of six years prescribed by 28 U.S.C. 2415 applies to such actions, United States of America v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 929 (C.A. 4, 1975). Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

* * *

29 C.F.R. § 4.191 Complaints and compliance assistance.

(a) Any employer, employee, labor or trade organization, contracting agency, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent

violation of the Act, or of any of the rules or regulations prescribed thereunder.

* * *

§ 631. Discharge or resignation of employees; payment after termination of employment

A. (1)(a) Upon the discharge of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, nor later than three days following the date of discharge.

(b) Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday or no later than fifteen days following the date of resignation, whichever occurs first.

(2) Payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.

(3) The provisions of this Subsection shall not apply when there is a collective bargaining agreement between

the employer and the laborer or other employee which provides otherwise.

B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the three day period provided for in Subsection A of this Section.

§ 632. Liability of employer for failure to pay; attorney fees

Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

06 January 1993

Mr. Don Ferguson
U.S. Dept of Labor
Wage & Hour Division
3732 Government
Alexandria, LA 71309

Dear Mr. Ferguson:

Enclosed please find a formal complaint filed by the former manager and employees of Fidelity Technologies Inc regarding earned vacation time denied to us by above company.

Thank you for your time.

Sincerely, /s/ Donald Savant
Former FTC Employees

cc: Senator James David Cain
Senator John Breaux
Congressman Jim McCreary